

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

MAY 1996 SESSION

<p>FILED</p> <p>October 17, 1996</p> <p>Cecil W. Crowson Appellate Court Clerk</p>

STATE OF TENNESSEE)	NO. 01-C-01-9509-CR-00304
)	
Appellee)	DAVIDSON COUNTY
)	
V.)	
)	HON. J. RANDALL WYATT, JR.,
)	JUDGE
ANDRE CHAMBERLAIN)	
)	(Possession of Controlled Substance
Appellant)	with Intent to Sell, Aggravated Assault
)	and Sentencing)

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OPINION FILED: _____

AFFIRMED IN PART, MODIFIED IN PART AND REMANDED

William M. Barker, Judge

OPINION

The Appellant, Andre Chamberlain, appeals as of right his convictions and sentences for possession of 300 grams of a controlled substance with intent to sell and two counts of aggravated assault. He argues on appeal that:

(1) Evidence introduced at trial should have been suppressed because it was obtained as a result of an unlawful investigatory stop.

(2) The evidence presented at trial was insufficient to establish the serious bodily injury element of aggravated assault.

(3) The evidence presented at trial was insufficient to establish possession of 300 grams of a controlled substance with intent to sell.

(4) The trial court erred in imposing consecutive sentences.

Following a careful review of the record on appeal, we conclude that no reversible error appears with respect to the Appellant's conviction and sentences for the drug offense. For the reasons contained herein, however, we modify and reduce his two convictions for aggravated assault to assault and remand the case to the trial court for re-sentencing for those offenses.

On March 2, 1994, as police officers Antoinette Regnier and Michael Donaldson conducted a routine walk-through inspection of the Preston Taylor Housing Project, they observed a group of men standing in front of one of the apartments. When the police officers got closer to the group, two men started to walk away in different directions. Officer Donaldson approached the Appellant and officer Reigner approached the other man. Officer Donaldson asked Appellant a few routine questions such as his name, where he lived, and whether he was armed. In lieu of an intelligible response, Appellant brandished a knife. Officer Donaldson grabbed Appellant's wrist, spun him around and conducted a cursory frisk. Officer Donaldson did not find any other weapons on Appellant, but testified that he felt an object the size of a "King James Bible" that appeared to be wrapped in a plastic grocery store bag. At that point, Appellant broke free from Officer Donaldson's grip and started running. In flight, Appellant slipped and fell to the ground and officer Donaldson caught up with

him. An altercation ensued and Appellant managed to break free. Officer Reigner, who by now realized what was going on, ran towards Appellant and just before they collided, Appellant punched her in the face with enough force to “snap” her head backwards and cause her to fall. Officer Donaldson, who had gotten back up, wrestled Appellant to the ground, but Appellant again broke free, and to get away from officer Donaldson, who was lying on the ground, Appellant stomped him in the groin. Appellant then grabbed officer Reigner by her pony tail, pulled her down to the ground and started pulling her along the sidewalk by her hair. Before the Appellant continued his escape, he kicked officer Donaldson in the jaw and somehow caused him to sprain three fingers. In the ensuing pursuit, officer Donaldson saw Appellant discard small white “rocks” which were later found and determined to be “crack” cocaine. Finally, officer Donaldson pulled his gun, ordered Appellant to stop, and officers Donaldson and Reigner took him into custody. After police back-up arrived, a search of the area was conducted, during which 18.2 grams of crack cocaine was found strewn on the ground. Further, under some bushes only a few feet from where Appellant was finally apprehended, a police officer found a block of pure cocaine weighing 455.1 grams. Later, at the police station, the police found another 1.7 grams of crack cocaine on Appellant’s person.

Based on the foregoing evidence, the jury found Appellant guilty of possession of 300 grams or more of a controlled substance with intent to sell and two counts of aggravated assault. The trial court later sentenced him to twenty years imprisonment for the drug offenses and eight years imprisonment for each count of aggravated assault, all to be served consecutively.

I. SUPPRESSION OF THE EVIDENCE

The Appellant contends that the evidence of drugs introduced at trial should have been suppressed because it was a result of an unlawful investigatory stop. This issue is without merit.

Tennessee Rule of Appellate Procedure 3(e) provides that “no issue presented for [appellate] review shall be predicated upon error in the admission . . . of evidence . . . unless the same was specifically stated in a motion for a new trial; otherwise such issues will be treated as waived.” Tenn. R. App. P. 3(e); see also State v. Ashburn, 914 S.W.2d 108 (Tenn. Crim. App. 1995), perm. to appeal denied (Tenn. 1995). Here, Appellant’s motion for a new trial, filed on March 29, 1995, is void of any specifically stated issues pertaining to the suppression of illegally obtained evidence. Therefore, Appellant has waived this issue on appeal.

Nevertheless, because the issue is of constitutional proportions, we elect to address its merits. Under both the United States Constitution and the Tennessee Constitution, citizens are protected against unreasonable seizures. Therefore, the fundamental question in cases where a citizen’s encounter with police is challenged is whether or not the encounter has legally amounted to a “seizure.” A seizure does not necessarily occur just because a police officer approaches an individual and asks a few questions. Florida v. Bostick, 501 U.S. 429, 111 S.Ct. 2382, 115 L. Ed. 2d 389 (1991). A seizure has occurred only “if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.” United States v. Mendenhall, 446 U.S. 544, 554, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980); see also State v. Moore, 776 S.W.2d 933 (Tenn. 1989). Thus, whenever a police officer accosts an individual and restrains his freedom to walk away, he has “seized” that person. Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). In determining whether or not a citizen’s encounter with the police amounts to a seizure within the meaning of our Constitutions, the pivotal question is whether or not the police conveyed “a message that compliance with their requests is required.” Bostick at 436. “Factors to consider in determining the character of the encounter

include its location, the behavior of the police officer, including any show of force or authority, statements by the officer that the accused has become a specific focus of an investigation, and any requests to search.” State v. Wilson, Davidson County, C.C.A. No. 01C01-9207-CR-00219 (Tenn. Crim. App., Nashville, Oct. 14, 1993)(citing Moore, 776 S.W.2d 933)(citations omitted). In this case, Officer Donaldson approached appellant and asked only a few questions regarding his name, where he lived, and whether he was armed. Appellant has failed to introduce any evidence showing that Officer Donaldson’s questions actually or constructively restricted appellant’s liberty or in any way conveyed a message that the appellant was not free to leave. Accordingly, the initial encounter between the appellant and Officer Donaldson did not amount to a seizure within the meaning of the Constitution. Of course, once Appellant brandished a knife in a threatening manner, officer Donaldson had probable cause to seize and search Appellant. This issue is without merit.

SUFFICIENCY OF SERIOUS BODILY INJURY EVIDENCE

The Appellant contends that the evidence presented in court was insufficient to support the jury’s finding that officers Donaldson and Reigner suffered “serious bodily injury”, one of the essential elements of aggravated assault. Tenn. Code Ann. § 39-13-102 (Supp. 1995). Appellant argues that the officers suffered only bodily injury and that he therefore should have been found guilty of assault. See Tenn. Code Ann. § 39-13-101 (1991).

When an accused challenges the sufficiency of the convicting evidence, we must review the evidence in the light most favorable to the prosecution in determining whether “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). We do not reweigh or re-evaluate the evidence and are required to afford the State the strongest legitimate view of the proof contained in the record as well as all reasonable and legitimate inferences which may be drawn

therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). A guilty verdict rendered by the jury and approved by the trial judge accredits the testimony of the witnesses for the State, and a presumption of guilt replaces the presumption of innocence. State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973).

A defendant challenging the sufficiency of the proof has the burden of illustrating to this Court why the evidence is insufficient to support the verdict returned by the trier of fact in his or her case. This Court will not disturb a verdict of guilt for lack of sufficient evidence unless the facts contained in the record and any inferences which may be drawn from the facts are insufficient, as a matter of law, for a rational trier of fact to find the defendant guilty beyond a reasonable doubt. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982).

In order to convict Appellant of aggravated assault, the state had to prove that officers Donaldson or Reigner suffered serious bodily injury.¹

“Serious bodily injury” means bodily injury which involves:

- (A) A substantial risk of death;
- (B) Protracted unconsciousness;
- (C) Extreme physical pain;
- (D) Protracted or obvious disfigurement; or
- (E) Protracted loss or substantial impairment of a function or a bodily member, organ or mental facility.

Tenn. Code Ann. 39-11-106(33) (Supp. 1995). The different definitions of serious bodily injury should be interpreted under the doctrine of eiusdem generis, which when applied to this statute, means “the enumerated portions of the definition of serious

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Aggravated assault is defined as assault resulting in serious bodily injury to another or assault involving the use or display of a deadly weapon. Tenn. Code Ann. § 39-13-102 (Supp. 1995). For reasons not apparent in the record, the State did not charge Appellant with aggravated assault by use or display of a deadly weapon even though the record indicates that Appellant displayed a knife while being interviewed by officer Donaldson.

bodily injury should be read as coming from the same class of injuries.” State v. Sims, 909 S.W.2d 46 (Tenn. Crim App. 1995), perm. to appeal denied (Tenn. 1995). In Sims, the victim received a broken nose, a bruised cheekbone and a laceration across the bridge of her nose. She claimed to have dental injuries, as well, and to have been off work for five weeks. This Court concluded that she did not suffer extreme pain under the serious bodily injury definition. The Court held, recognizing the difficulty of measuring pain, that the pain associated with a broken nose, bruises and lacerations is not extreme enough to be classified together with injuries involving a substantial risk of death, protracted unconsciousness, protracted or permanent disfigurement, or the loss or impairment of the use of a bodily member, organ or mental facility. Id. The State has relied on two unreported decisions, State v. Givens, C.C.A. No. 01C01-9307-CR-00203 (Tenn. Crim. App., Nashville, Aug. 4, 1994) and State v. Campbell, C.C.A. No. 01C01-9302-CR-00061 (Tenn. Crim. App., Nashville, July 22, 1993), in arguing that the evidence is sufficient to support the conviction for aggravated assault. We are persuaded, however, that the reported Sims decision, which was not cited by the State, is the better reasoned decision, and because it is reported it is precedent.

In this case, Appellant stomped officer Donaldson in the groin, which caused him to “double over in pain” and later caused swelling and bruising. Appellant also kicked officer Donaldson in the jaw causing soft tissue lacerations, caused him to sprain three fingers, and punched him in the face and in the chest. Officer Donaldson was returned to full duty five days after the incident. Appellant punched officer Reigner in the face with a closed fist causing her to fall to the ground and later caused bad swelling and bruising. Appellant also grabbed her by her ponytail, pulled her to the ground, and pulled her along the sidewalk by her hair. Officer Reigner suffered pain, lost a substantial amount of hair, and was scratched from being dragged on the sidewalk. She returned to full duty the day after this incident occurred.

Both officers Donaldson and Reigner were beaten and bruised by Appellant and there is no doubt that they suffered pain, but there was no evidence that those

injuries would be serious enough to fall under the serious bodily injury definition. The Appellant's convictions for aggravated assault, therefore, must be set aside and reversed.

The record, however, does contain more than sufficient evidence to support convictions for the offense of assault. Assault is defined as the intentional, knowing or reckless causing of bodily injury to another. Tenn. Code Ann. § 39-13-101 (1991). Bodily injury is defined as "a cut, abrasion, bruise, burn or disfigurement; physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty." Tenn. Code Ann. § 39-11-106 (Supp. 1995). The record contains ample evidence that both officers suffered bodily injury and that Appellant caused the bodily injury intentionally, knowingly or recklessly.

In sum we find that there is insufficient evidence to support the aggravated assault convictions. We conclude that the convictions must be modified to assault.

SUFFICIENCY OF POSSESSION OF CONTROLLED SUBSTANCE EVIDENCE

The Appellant contends that the evidence presented in court was insufficient to support the jury's finding that he was guilty of possession of 300 grams of a controlled substance with intent to sell. This issue is without merit.

As previously stated, a defendant challenging the sufficiency of the proof has the burden of illustrating to this Court why the evidence is insufficient to support the verdict returned by the trier of fact in his or her case. Tuggle, 639 S.W.2d 913.

In order to convict the Appellant of possession of 300 grams of a controlled substance with intent to sell, the State was required to show that Appellant knowingly possessed 300 grams or more of a substance containing cocaine and that the Appellant intended to sell such controlled substance. Tenn. Code Ann. § 39-17-417 (1991). Appellant has failed to show that the evidence introduced at trial was insufficient. The jury chose to credit the State's witnesses and the circumstantial

evidence presented at trial and found that the evidence was sufficient to support the conviction. Questions concerning the credibility of witnesses, the weight and value to be given to the evidence are resolved by the trier of fact, not this Court. Cabbage, 571 S.W.2d at 835. The Appellant has failed to overcome the presumption of guilt on appeal and we find this issue to be without merit.

SENTENCING

Finally, the Appellant contends that the trial court's imposition of consecutive sentences for the possession of a controlled substance and the assault crimes was erroneous. The Appellant was sentenced to twenty (20) years imprisonment upon his conviction for possession of 300 grams of a controlled substance with intent to sell and eight (8) years imprisonment for each count of aggravated assault. (The aggravated assault convictions have been reduced to assault and are subject to a new sentencing hearing, but in the interest of judicial economy we will address the issue of consecutive sentencing.)

When an Appellant complains of his or her sentence, we must conduct a de novo review with a presumption of correctness. Tenn. Code Ann. § 40-35-401(d). The burden of showing that the sentence is improper is upon the appealing party. Tenn. Code Ann. § 40-35-401(d), Sentencing Commission Comments. This presumption, however, is conditioned upon an affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991).

A defendant convicted of more than one criminal offense can be given consecutive sentences if the trial court finds by a preponderance of the evidence that:

- (1) The defendant is a professional criminal who has knowingly devoted himself to criminal acts as a major source of livelihood;
- (2) The defendant is an offender whose record is of criminal activity is extensive; [or]

- ...
- (6) The defendant is sentenced for an offense committed while on probation.

Tenn. Code Ann. § 40-35-115(b).

The trial court in this case found that Appellant for the last seven to eight years primarily used criminal acts such as selling drugs as a major source of his livelihood, that Appellant has an extensive criminal record, and that the Appellant committed these acts while being on probation from a similar incident that occurred earlier in 1994. We find no error with regard to the consecutive sentences.

Accordingly, the Appellant's conviction and sentence for possession of a controlled substance with intent to sell is affirmed. His convictions for aggravated assault are modified and reduced to two convictions of assault, and this cause is remanded to the trial court for a new sentencing hearing on Appellant's assault convictions.

WILLIAM M. BARKER, JUDGE

CONCUR BY:

GARY R. WADE, JUDGE

JOSEPH M. TIPTON, JUDGE